No. 17-872

IN THE

# Supreme Court of the United States

BRUCE WALKER,

*Petitioner,*

v.

ESTATE OF RYAN L. CLARK,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF OF PETITIONER


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## REPLY BRIEF OF PETITIONER

The brief in opposition ("Opp. Br.") confirms that the parties agree on the essential facts relevant to respondent's section 1983 claim in its current posture. These include, especially, the following:

- Petitioner Bruce Walker, a corrections officer assigned to intake duties, performed an initial suicide risk assessment when he booked Ryan Clark into the Green Lake County Jail.
- Walker placed Clark in a highly visible holding cell in the jail's booking area until Clark could be further assessed by the jail nurse, and Walker passed along all of the information that he had gathered during his initial assessment.
- The nurse thereafter conducted her own assessment with the benefit of the information gathered by Walker. Based on her assessment, she placed Clark not on a suicide watch but in a special needs cell monitored by closed-circuit camera because he was intoxicated at booking.
- Walker had no further interaction with Clark.
- Clark committed suicide in the special needs cell five days later (or, if one prefers, even though the booking had been in the morning, "[f]our nights" later, Opp. Br. 3, *accord* Pet. App. 6).

On these facts, the legal question presented by Walker's qualified-immunity defense is whether "every reasonable official" would have understood "legal principle[s] clearly [to] prohibit [Walker's] conduct in

the particular circumstances before him." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). The answer is "no." To say that Clark had a right to be free from deliberate indifference to a risk of his suicide—which is the extent of the clearly established law to which respondent can point—does not do the job: Under this Court's precedent, something considerably more specific in the case law would be required to defeat Walker's defense of qualified immunity.[1]

Yet respondent, like the court of appeals, proceeds at just such a high level of generality. It seeks to avoid the legal consequences of thus never looking beyond the general deliberate-indifference standard by asserting that Walker did nothing to respond to the circumstances confronting him when he booked Clark into the jail. This characterization, which appears to have become something of a routine approach for the Seventh Circuit, cannot be squared with the record or the law of qualified immunity.

## I. RESPONDENT IGNORES CORE QUALIFIED-IMMUNITY PRINCIPLES BY POINTING TO NO PRECEDENT THAT WOULD HAVE PUT WALKER ON NOTICE THAT HE WAS PROCEEDING UNLAWFULLY.

Without reasserting all of the core principles of the qualified-immunity doctrine, it is important to recall

[1] All this is why it is unavailing for respondent (like the court of appeals) to assert that Walker would have taken the same steps with another inmate presenting a lesser risk of suicide. The core question presented by Walker's qualified-immunity defense is whether he was on fair notice that his approach in the circumstances confronting him during Clark's booking was constitutionally inadequate. Walker is entitled to immunity because respondent and the court of appeals have pointed to no prior precedent establishing that he was.

that, for a constitutional right to have been clearly established (as is required to defeat the defense), "'the right's contours'" must have been "'sufficiently definite that any reasonable official in [the defendant's] shoes would have understood that he was violating it.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). Just this Term, the Court has emphasized that "[t]his requires a high 'degree of specificity'" in existing law. *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)). To put it in practical terms: Qualified immunity is appropriate unless one "of [the] precedents squarely governs the facts here," such that "only someone plainly incompetent or who knowingly violate[s] the law" would have proceeded as the defendant government official did. *Mullenix*, 136 S. Ct. at 310 (internal quotation marks omitted); *accord White v. Pauly*, 137 S. Ct. 548, 551-52 (2017) (and cases cited).

Respondent, like the Seventh Circuit here, occasionally recites but in practice ignores this law. Each thinks it sufficient that "[t]he Eighth Amendment right to be free from deliberate indifference to a known risk of suicide . . . has been clearly established in that circuit for many years." Opp. Br. 13; *accord* Pet. App. 13. However, under this Court's precedents, this formulation of the right in question is not sufficient to sustain respondent's challenge to Walker's qualified-immunity defense. That the articulation is far too general is demonstrated by this Court's qualified-immunity pronouncements all the way from *Anderson v. Creighton*, 483 U.S. 635 (1987), through *Sheehan*, *Mullenix*, *White*, and, now, *Wesby*. There is no material difference in this respect between a right to be free from unreasonable searches and seizures (to take the

example that this Court rejected as overly generalized in *Sheehan*) and the right to be free from deliberate indifference to the risk of suicide. Nothing about the general deliberate-indifference standard would have caused "any reasonable official in [Walker's] shoes [to] underst[an]d that he was violating it" in the specific circumstances of the primary conduct here. *Compare Sheehan*, 135 S. Ct. at 1774. Simply to give an alternative formulation: The unlawfulness of Walker's conduct "'does not follow immediately from the conclusion that [the right against deliberate indifference to suicide] was firmly established.'" *Compare Wesby*, 138 S. Ct. at 590 (quoting *Anderson*, 483 U.S. at 641). Thus, the "rule is too general." *Id.*

In short, "[t]ellingly, neither the panel [nor respondent] ha[s] identified a single precedent—much less a controlling case or robust consensus of cases—finding a [constitutional] violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591 (quoting *White*, 137 S. Ct. at 552). Walker thus did not have fair notice that he was violating the Constitution.

## II. THIS IS ONE OF A SERIES OF CASES IN WHICH THE COURT OF APPEALS HAS SOUGHT TO SIDESTEP THIS COURT'S QUALIFIED-IMMUNITY TEACHINGS.

Respondent, like the court of appeals, seeks to avoid this dispositive point by maintaining that Walker did "nothing" to respond to the risk that Clark would commit suicide. *See*, *e.g.*, Opp. Br. 1 ("nothing"), 5 ("absolutely nothing"), 17 ("*no* steps"); Pet. App. 16 ("he chose to do nothing"). Surely, the thinking goes, it must be clearly established that a corrections officer violates the Eighth Amendment if he does nothing in

response to a known risk of suicide—and so there is no need to define the right in question more specifically or to point to prior case law that would have put Walker on notice. This will not work.

First, it ignores the facts. These include that Walker conducted a suicide risk assessment of Clark, placed him in a very near and highly visible holding cell, and passed along all of the information he had obtained (including the results of the Spillman Assessment), which duly went to the medical staff who he knew would conduct a further evaluation of Clark.[2] *See supra* p. 1 (recounting essential facts). Thus, even to leave aside the facts that Clark died (a) some five days after Walker's only interaction with him and (b) in the different cell to which the nurse had assigned him in the meantime, it is simply not true that Walker did nothing.[3]

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[2] This fact reveals the misleading nature of respondent's statement that Walker "*said* nothing to anyone about Clark's risk of suicide." Opp. Br. 1 (emphasis added).

[3] Respondent points to alleged issues of fact that it contends make the petition an inappropriate vehicle to address the qualified-immunity doctrine. Even conceding these alleged issues of fact to respondent, however, alters nothing about the flawed approach employed by both respondent and the court of appeals. For example, Walker's petition fully acknowledges that the Spillman Assessment used during Clark's booking issued a "MAX" rating. *See* Pet. 6, 7, 24. Further, the other alleged disputes cited by respondent—whether Walker rather than the nurse should have conducted a second, more in-depth suicide risk assessment, and whether Walker rather than the nurse had the authority to make a final housing determination for Clark—relate only to whether Walker strictly adhered to internal departmental policy, not whether the Eighth Amendment was violated.

Second, while the foregoing point is dispositive against the claim that Walker did nothing, the court of appeals' (and respondent's) approach ignores the wide spectrum of case law—even within the Seventh Circuit—about what constitutes an imminent risk of suicide and, for the other half of the general constitutional standard, what measures are required to avoid deliberate indifference to such a risk. It is sufficient here to note that the cases simply would not suggest to an officer in Walker's situation, in any particular or specific way, that to proceed as—i.e., to do what—Walker did was to violate Clark's constitutional rights.[4] Nor does respondent argue otherwise about the precedents. In fact, respondent here cites Seventh Circuit cases not as reflecting any factual similarity (and thus as providing fair notice to Walker) but rather only (a) for the general standard of deliberate indifference, *see, e.g.,* Opp. Br. 7, 13, and (b) in an effort to demonstrate that the Seventh Circuit has been "particularly insistent," in very different situations from the case at bar, on denying qualified immunity in the risk-of-suicide context and sending the cases to a jury. *See* Opp. Br. 19-20 n.3. The former (i.e., (a)) does not do the job, *see supra* Part I, and the latter (i.e., (b)) is, if anything, a point for Walker, given what it says about the routine approach of this circuit. *Cf. infra* p. 8.

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[4] It does not fall to Walker to adduce examples in this context where respondent has not done so, but one recent case (citing others) from the court of appeals is *Rosario v. Brawn*, 670 F.3d 816 (7th Cir. 2012), where the court upheld a determination that officers did not act with deliberate indifference when a mentally troubled individual committed suicide in their custody with a razor blade that the officers had failed to remove from his possession.

Such consideration of Seventh Circuit precedent would be absolutely necessary for respondent to defeat qualified immunity because, as this Court explained in *Taylor v. Barkes*, 135 S. Ct. 2042 (2015), there is no Supreme Court precedent at all on the specific measures that correctional institutions must take in response to an imminent risk of suicide. *Id.* at 2044. It is true that the claim in *Taylor* was against supervisory corrections officials, but that particular detail does not help respondent: The fact that there is no such precedent from the Court—indeed, that "[n]o decision of this Court even discusses suicide screening or prevention protocols," *id.*—is just as applicable here in the context of respondent's claim against an individual officer. Respondent needs to point to precedent, not its absence.

It is no response, as the court of appeals and respondent here have maintained, to suggest that Walker seeks a rule that would result in qualified immunity unless there were a precedent precisely on all fours with the facts of this case. If the claim were that Walker acted incompetently (i.e., what this Court has described as the "rare 'obvious case,'" *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)), for example, the fact that a particular approach was incompetent would not have to be demonstrated in the precedents. But respondent does not rely on this exception. Here, Walker did what he did, and respondent (and the court of appeals) might have preferred that he had proceeded differently, but the inescapable—and dispositive—fact remains that Walker had no fair notice that through his actions he was violating Clark's constitutional rights.

Finally, while Walker has eschewed the sort of colorful rhetoric that respondent uses to characterize the argument here (maintaining that Walker presents "the Seventh Circuit . . . as a rogue circuit"), it *is* true that the court of appeals' technique for avoiding the rigorous standards of the qualified-immunity doctrine goes beyond this case. In a series of cases, the court of appeals has taken to characterizing a defendant officer as having done "nothing"—where in fact the complaint really is that the defendant did not take *some* actions that the plaintiff now wants—in order to sidestep the need to engage with the question whether case law has dealt with analogous factual circumstances and thus provided the defendant fair notice.[5] This Court's review is thus important.

## III. RESPONDENT FAILS TO ADDRESS THE SEVENTH CIRCUIT'S MISINTERPRETATION OF *JOHNSON V. JONES*.

As noted in Walker's petition, the court of appeals' opinion misinterpreted this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), in two distinct respects.

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[5] *See Estate of Perry v. Wenzel*, 872 F.3d 439, 460 (7th Cir. 2017) (reversing summary judgment based on qualified immunity on grounds that defendants "fail[ed] to take *any* action in light of a serious medical need"), *petitions for cert. pending* (No. 17-871, filed Dec. 15, 2017, response requested by the Court on Feb. 7, 2018 and due Mar. 9, 2018, and No. 17-890, filed Dec. 15, 2017, response requested by the Court on Feb. 15, 2018 and due Mar. 19, 2018); *Orlowski v. Milwaukee Cty.*, 872 F.3d 417, 422 (7th Cir. 2017) ("If Alexander and Manns chose to do nothing despite this duty, they violated 'clearly established' Eight[h] Amendment law.") (footnote omitted), *petition for cert. pending* (No. 17-883, filed Dec. 15, 2017, response requested by the Court on Jan. 30, 2018 and due Mar. 1, 2018).

First, the court erroneously concluded that *Johnson* precluded it from considering whether its prior cases were factually distinguishable such that Walker would not have been on notice that his conduct was unconstitutional. *See* Pet. 20-21 n.3. About this respondent has nothing to say. This error may not be an independent reason to grant the petition, but—together with the avoidance technique of characterizing a defendant who in fact acted, if imperfectly, as having done nothing—it does demonstrate how little affinity for this Court's teachings concerning qualified immunity the court of appeals' opinion reflects.

Second, the court mistakenly concluded that it could not address "step 1" of the qualified-immunity analysis—whether Walker violated Clark's Eighth Amendment rights—because it involved consideration of whether the facts, when construed in respondent's favor, would permit a jury to find that Walker committed the claimed constitutional violation. *See* Pet. 27-29. This, too, is fundamental error, and here, again, respondent says nothing actually responsive. It simply repeats the general holding of *Johnson*. *See* Opp. Br. 18-19. To do that is necessarily to confirm Walker's essential point: namely, that *Johnson* does not preclude consideration of the question whether the given facts establish a violation of clearly established law. And this *is* an independent reason for certiorari (forming the second question in the petition). *See also* Pet. 28 (discussing relevance of *Stinson* case coming from the Seventh Circuit).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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